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IN THE

Supreme Court of the United States

October Term, 1982

ALPHONSE MARRALE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

I. Did the prosecution summation, when uncorrected by any cautionary instruction, deprive petitioner of his Fifth Amendment right to a fair trial?

II. Did the Trial Court err in admitting petitioner's post arrest statements taken following his in home, non exigent, warrantless arrest.

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The petitioner, Alphonse Marrale, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 13, 1982.

Opinion Below

The opinion of the Second Circuit, rendered on December 13, 1982 is unreported but reproduced in the Appendix, *infra* at p. 1a.

Jurisdiction

On December 13, 1982 the Second Circuit entered its judgment affirming the judgment of conviction entered by the District Court, EDNY, following a jury verdict finding petitioner guilty of conspiracy to steal, conceal and possess monies stolen from a foreign shipment in violation of 18 U.S.C. 371.

Petitioner was sentenced on May 14, 1982 to the custody of the Attorney General for an indeterminate term as a young adult offender pursuant to 18 U.S.C. 5010(b). He is serving that sentence.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Amendment Involved

United States Constitution, Fifth Amendment:

> No person shall...be deprived of life, liberty or property, without due process of law;...

Statement of the Case

A. The Indictment

This was a five count indictment naming Frank Marrale, his nineteen year old son, petitioner Alphonse Marrale, and Vincent Gambale. Gambale's trial was severed by reason of his counsel's trial engagement.

Alphonse Marrale was named in Count One (conspiracy to steal, conceal and possess stolen monies), Count Three (aiding and abetting the other defendants to possess the stolen monies in violation of 18 U.S.C. 659 and 2), and Count Five (aiding and abetting the other defendants to receive, possess and conceal the said monies in violation of 18 U.S.C. 2113(c) and (2)).

B. The Trial

The Court's View of the Case

At the conclusion of the government's case, the Court stated:

> There is a serious question as to whether or not the government has presented sufficient facts for Alphonse Marrale's case to go any further. (A 112)(719).[1]
>
> But, I will be very frank with you, this evidence is kind of skimpy. (A 113)(723).
>
> It is very, very skimpy as to Alphonse Marrale, I will tell you that. It's very skimpy. Listen, I'm going to let you (addressing the prosecutor) work. You can have all night, you know. (A 113)(723).

Following argument the next morning, the Court stated:

> I might put it to you this way. Even though I've sustained it to the conspiracy it's not a strong case on that and the jury could find either way. (A 114)(751).

The prosecutor agreed. (A 114)(751).

The result was that as to Counts Three and Five (charging, aiding and abetting) a directed judgment of acquittal was granted. (A 115)(758).

The Government's Case Generally

Frank Marrale[2] and Steven Mui were employed as couriers for Armored Express Company with the responsibility of making pickups of monies from various

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[1] References to "A" are to the Joint Appendix in the Court of Appeals. Those numbers without a prefix are to pages of the trial transcript.

[2] Hereinafter, Alphonse Marrale will be referred to as petitioner so as not to confuse him with his father.

locations including department stores and banks (143). The Company at times picked up currency at New York banks and made deliveries to Kennedy Airport for shipment to foreign banks (143).

Marrale had joined Armored Express in March or April, 1981, after leaving a small trucking business, Marrale Trucking, which he had operated with his two brothers and son, the petitioner.

Some time in the Spring of 1981 Frank Marrale became Mui's supervisor at Armored Express with the former acting as driver of the Armored truck and the latter acting as a messenger.

Mui noticed that though airline pilots were obliged to check the seal numbers on bags containing currency delivered to them by Armored Express for foreign shipment against the shipping documents, this in practice was not done (150). Some time in or about May, 1981, Frank Marrale and Mui started to discuss the possibility of switching bogus bags and seals for real bags and seals which contained the currency consigned to be shipped abroad (152-154). Marrale said that he had three people who could arrange to make up substitute bags and seals. It would be Mui's function then to switch the bags (156). The plan was to wait to steal a shipment of over one million dollars which would then be split with Marrale's two unnamed partners after the expenses of laundering (A 65-6)(160-1). The time and particular shipment was to be decided upon when the appropriate occasion arose.

On November 10, 1981, Mui and Marrale were doing evening work picking up money from stores and businesses in the theatre district of Manhattan (183). At 9:00 p.m. that evening Mui learned that there was a late Korean and Japan Airlines shipment scheduled to be delivered to JFK by 1:00 a.m., November 11, 1981. Marrale had access to the vault area. He told Mui that he was going to call the "third guy" to have him bring over a car in which there would be five filled bogus bags with bogus seals. The car would be parked on West Street across from Armored Express.

At 11:50 p.m. on November 10, 1981, Marrale, driving the Armored truck, pulled it next to a Lincoln automobile and then exited the truck, opened the trunk of the Lincoln automobile and took out five bags which he placed into the Armored truck behind the seat of the driver. Marrale and Mui then proceeded in the truck to an entrance of Armored Express (206). Mui secured the necessary paperwork for a $9 million shipment - $7 million to Japan Airlines, $2 million to Korean Airlines. He took the five bags containing $2 million consigned to Korean Airlines and put them in front of the driver's seat (207). In the front of the truck, Mui switched paper tags from the five real bags of money and attached them to the bogus bags (210). He then placed the real bags behind the driver's seat and covered them. The bogus bags, now bearing bona fide Korean Airlines tags, were placed at his feet in the front of the truck between himself and the driver who was Marrale. Two other guards loaded nineteen (19) bags of money to be delivered to Japan Airlines. The truck then headed for Kennedy Airport with Marrale driving. Arriving at Kennedy Airport, Mui and another unsuspecting guard unloaded the five bogus bags and brought them to the pilot of the Korean Airlines plane. The pilot signed the invoice furnished by Mui without checking to see whether the identification numbers of the seals on the five bags reflected on the paperwork matched the identification numbers of the seals on the five bags.

The Armored truck then proceeded to Japan Airlines where nine of the nineteen bags were delivered. Since there was a discrepancy in the airway bill, the other ten bags of money consigned to Japan Airlines had to be returned to Armored Express. The truck then left Kennedy Airport and returned to Armored Express with Marrale driving.

When the truck arrived back at Armored Express, Marrale gave Mui car keys to Marrale's own Cougar automobile and told him to unload the five bags of money then still hidden behind the driver's seat in the

Armored truck and to place them into the trunk of Marrale's car. Meanwhile, Mui noticed a 6 ft. tall, 190 lbs. individual entering the Lincoln automobile, from which the five bogus bags had been earlier taken by Marrale. Marrale then drove Mui home to Chinatown. During the course of the drive Mui was able to see the Lincoln automobile following and made note of the license tag number "906 GUZ" (247).

Marrale stated that there were five people involved in the theft of the $2 million. Marrale and Mui were to receive $400,000 each, a third partner operating the Lincoln and two of his friends who assisted in setting up the theft were to receive $400,000 and the remainder of the money would go to the person doing the laundering. (A 72-3)(249-250).

Several days later Armored Express officials asked Mui to take a lie detector test (259). Prior to taking the test, Mui took pills which he first said he obtained from Frank Marrale (260). Feeling that he had failed the lie detector test and concerned about his role in the robbery, he spoke with an attorney, was referred to the U.S. Attorney's Office and thereupon agreed to cooperate on December 4, 1981 in return for transactional immunity (269).

Between December 4 to 9, 1981, Mui made a number of consensual tape recordings with Frank Marrale and one recording on December 9 with Alphonse Marrale, the petitioner.

On December 6, 1981, at a Shopping Mall in Brooklyn, Frank Marrale delivered a little less than $300,000 to Mui.

Between December 7 and December 9, Marrale and Mui had additional conversations in which Mui pressed to obtain the remaining $100,000 that was his share of the proceeds. Marrale promised, on December 9, to have the monies delivered to Mui "by the end of the week."

The Government's Case Against Alphonse Marrale In Particular

(1) Before the money was stolen, Frank Marrale told Mui that Alphonse "would know the business he's dealing with - with third parties, in case anything go wrong with him" (A 68)(163).

However, Mui testified:

Q. Did he tell you whether or not his own son knew about his plan to steal the money?

A. No. (A 68)(163).

(2) In the tape of December 9, 1981 at 9:05 p.m. when Mui pressed Marrale for the remainder of his share, Marrale stated that Mui was not to worry: "I gotta make my son meet you...I'll make my son bring it to you..." Again, Marrale stated: "I'll probably make my son deliver it cause they ain't watching him..." Finally: "maybe I'll send him up to the restaurant."

The record is clear, however, that the petitioner never delivered money to Mui and was never seen carrying any package or even meeting with the co-conspirator Gambale. To be sure, FBI Agent Gaither testified that there never had been any surveillance of petitioner either before or after his arrest, obviously, so little interest was there in him though the money remained unrecovered (A 101-10)(708-717). There was no proof Frank Marrale spoke to petitioner after his call. To be sure, he was arrested shortly thereafter that night (A 98-100)(677-679).

(3) Mui, prior to taking the lie detector test, had been told by Frank Marrale to pick up a pill from petitioner (A 69-70)(423-424). The pill was contained in a plastic envelope and there was no indication whatsoever that petitioner was aware of the contents of the package which his father had given him to pass on to Mui or the purpose for which it would be used (444-51).

(4) On December 9, 1981, a few minutes after 4:00 p.m., Alphonse Marrale called Mui and told him:

We gonna lay low for a while, all right.

They're following my father...Don't worry about it...yeah, do not worry about it...[He][3] said they're following him.

I'll know what the rest of the story is.

(5) Early the morning of December 10, 1981, agents of the FBI entered the Marrale residence without a warrant and found therein petitioner, his mother, his 13 year old sister and 11 year old brother. He was told that he was under arrest for conspiracy in the robbery of $2 million from Armored Express (567). Petitioner was handcuffed behind his back. His mother and sister were crying. The mother was concerned about what had happened to her husband who, unknown to her, had been arrested some eight (8) hours before (A 74-78)(573-577). Petitioner was taken to an FBI vehicle for the ride back to the FBI Queens office. Despite petitioner's complaint that the handcuffs were too tight, no one did anything to relieve the pressure (A 75)(574). He did not act cocky or arrogant to anyone (A 75-86)(574-585). Agent Trahon testified petitioner "seemed to be confused" (A 71)(486).

Agent Flagg started to question petitioner in the car. Agent Flagg admittedly lied to petitioner (A 88-91)(607-610). The lie was enough to put fear in any reasonable man. That is, Agent Flagg told the petitioner that he was in trouble because Marrale had told the FBI that his son, petitioner, was involved in the conspiracy. The reason the Agent did this was admittedly to trick him (A 90)(609). As a result, petitioner denied that he knew or that he had called Mui. Later that morning when the December 9th tape between petitioner and Mui was played, petitioner admitted that he made the call because his father had come to the garage where petitioner worked around 3:00 p.m. on December 9 and told him to make the telephone call at 4:00 p.m. (A 92-4, 95-6)(646-648)(674-675).

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[3] The government's transcript, not in evidence, reflects "I said". The tape we submit reflects "He said."

The Defense Case and Government Rebuttal

Petitioner testified on his own behalf. Nineteen years of age when arrested, he had no prior criminal record. He lived his entire life in a small two bedroom apartment with his mother, father, Frank Marrale, 13 year old sister and 11 year old brother, sleeping on a couch, not a bed, in the living-room against the common wall to his parents' bedroom. He left school when he was 15½, with grades in his last year as follows: English 40, Social Studies 50, Math 55, Science 0 and Foreign Language 0 (A 116-20)(761-765). After leaving school he worked as a helper at a business known as Marrale Trucking which was owned by his father and two uncles. He earned $75.00 a week. After his father left Marrale Trucking to work for Armored Express, the uncles formed a new company at the same location known as A & R Trucking and made him President (A 121)(766). His duties were nonetheless that of a mechanic. He earned, as of the time of trial, $130.00 a week.

It was in November, 1981, either by radio or in the newspapers that petitioner first learned about a $2 million theft. He did not know it involved his father until he heard his father complaining to his mother that the father was being wrongly blamed for the lost shipment (A 124-25)(769-70). During November and December, 1981, he frequently heard his mother and father talking about the fact that the authorities were wrongly accusing his father. He felt reassured when he heard his father say to his mother that he did not steal any money and in fact had taken a lie detector test and passed it.[4] (A 126-28)(771-73).

On December 9 at about 3:00 o'clock, petitioner was under a car repairing it at the A & R garage when his father came in and told him to make a call. After repeating the message that the father wanted conveyed,

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[4] The father had in fact taken a lie detector test and passed it.

and finding that petitioner did not have it down accurately, the father wrote it out on a piece of paper. The father had said to tell Mui that they were following him, but not to worry, that as a result he and Mui were going to have to lay low for awhile (A 128-31)(773-776). Petitioner, from the point that his father instructed him to make this call, became concerned about his father's situation and asked whether everything was all right. The father responded that everything was in fact all right and that he would talk to his son later that night when he came home (A 128-30)(773-775). Petitioner called Mui at 4:06 p.m. and conveyed the message.

The father never came home, for that night he was arrested.

Another incident involved petitioner. In November, Frank Marrale came to the premises of A & R Trucking, gave his son an envelope and told him to give it to Mui when he came by (A 131-33)(776-778). Neither on the occasion when the petitioner called Mui, or gave him the envelope was this as a result of any mere request made by the father. Rather, these were the son's responses to directions from a parent.

In the early morning hours of December 10, agents of the FBI, without a warrant and with no showing of exigent circumstances, entered the apartment where petitioner resided, took him off the couch where he had been sleeping in his underwear, told him to get dressed, then pushed his head against the wall and cuffed him. All the while, the mother was screaming and the children were crying. In the Bureau car, Agent Flagg asked petitioner "where did you put the money?" He became "scared" and thereafter lied about whether he had called Mui (A 137)(782). Petitioner, upon arriving at Bureau Headquarters in Queens, was lied to by FBI Agent Nicols, who falsely told him "your father told us everything and how do you feel now that your father gave you up" (A 138)(783). Petitioner claimed his innocence but lied as to whether he had called Mui. The false exculpatory statement of the petitioner as to

whether he had called Mui was explained by reason of his fright and the fact that he did not want to get himself into any trouble. As earlier noted, he had in fact become concerned the afternoon of December 9, when his father told him to call Mui and convey a message, but had been reassured by the father that everything was all right and that the father would talk to him later that night.

Petitioner had never been asked by his father to deliver any monies to anyone (A 141)(786). To be sure, as earlier noted, so unimportant was the petitioner that the FBI, concerned as it was and still is about the recovery of the monies, never undertook at any time to surveil petitioner (A 104-10)(711-717).

The cross examination of the petitioner was directed at showing that he was smarter than his school grades made him appear.[5] After all, the government claimed, he was the President of a trucking company, he had enrolled as a welding student at Apex Technical School where he passed an English Comprehension test and what was even more compelling, he dated for a time a college girl (792-793). The problem with this was that the trucking company had two or three trucks, petitioner was a mechanic-in-fact and only the nominee President. As far as the English comprehension test was concerned, it was admitted in evidence as petitioner's Exhibit A (866). The test results proved nothing, that is, petitioner was able to solve the following problems: 6 + 2 = what; 5 - 3 = what; how many minutes are in an hour and a half and so on (A 143-44)(868-869).

The prosecution offered a witness in its rebuttal case, Edward J. Farrell, who was a welding teacher at Apex Technical Institute. The thrust of his testimony was that the petitioner was a good welding student. The relevance of this was marginal to say the least (870-901). Following this witness, both sides rested and awaited final summations and charge.

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[5] In summation, the prosecutor falsely stated that the low grades were the result of his never attending class (787).

The Prosecution Summation

In a no holds barred, overly zealous summation, the prosecution acted in such a way as to deprive petitioner of a fair trial in these following respects.

(1) The prosecutor repeatedly made derogatory comments about defense counsel (A 160, 163, 169, 185, 187-89, 192, 207-08)(958, 961, 967, 983, 985, 986, 987, 990, 1074-75);

(2) She made improper comments about the defense itself (A 157-58, 218)(955-56, 1085);

(3) She injected her own personal beliefs and thus credibility, repeatedly using the first person (A 200) (997). For examples of this, see: (A 154, 156-58, 162, 167-68, 217)(952, 954, 955-56, 960, 965, 966, 1084). Use of the first person exceeded forty occasions;

(4) She vouched for the truthfulness of Mui, the linchpin witness (A 154, 186)(952, 1984);

(5) She asserted as facts that which had not been proved (A 194, 219)(992, 1086);

(6) She made material misstatements of facts (A 151)(949).

In this admittedly "skimpy" case, the prosecutor's improper statements caused substantial prejudice to the petitioner's right to a fair trial. Despite objections, the Trial Court did nothing to insulate petitioner from this undue prejudice (A 196-201, 221-23)(994-998, 1088-90).

C. The Second Circuit Opinion

On December 13, 1982 the Court affirmed the conviction, holding in part, that the prosecutor was justified in commenting in a disparaging way about defense counsel's conduct by reason of the defense lawyer's tactics. In addition, the prosecutor's remarks were not so egregious as to fall into the category of impermissible conduct.

In response to petitioner's argument that under *Taylor v. Alabama*, 50 U.S.L.W. 4783 (June 23, 1982) the post arrest statements should have been suppressed, as the product of an illegal warrantless non exigent arrest in petitioner's home, the Court ruled that the argument had not been properly preserved and therefore was waived. Of course, the trial was concluded well before *Taylor, supra.*

Critically important, the Court erroneously ruled, ignoring *Payton v. New York*, 445 U.S. 573 (1980), that "Since probable cause existed, no arrest warrant was required" (16a). This clearly contravenes this Court's holding in *Payton.*

Reasons for Granting the Writ

I

The Comments in Summation by the Prosecutor Offended Principles of Fairness Properly Enunciated by Other Courts. The Opinion of the Second Circuit Improperly Ignores These Principles. Petitioner Was Deprived of a Fair Trial.

Just a few months prior to the trial of the instant case, the Second Circuit itself recognized that:

> A prosecutor's improper summation results in a denial of due process when the improper statements cause substantial prejudice to the defendant. See, e.g. *United States v. Bivona, supra,* 487 F.2d at 444; *United States v. White,* 486 F.2d 204, 205 (2d Cir. 1973), *cert. denied,* 415 U.S. 980 (1974); cf. *United States v. Morris, supra,* 568 F.2d at 402. Often, the existence of substantial prejudice turns upon the strength of the government's case: if proof of guilt is strong, then the prejudicial effect of the comments tends to be deemed insubstantial; if proof of guilt is weak, then improper statements are more likely to result in reversal. *Compare United States v. Gallagher, supra,* 576 F.2d at 1042-43 and *United States v. Benter,* 457

F.2d 1174, 1178 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972) with *Berger v. United States*, *supra*, 295 U.S. at 88-89 and *United States v. Burse*, *supra* 531 F.2d at 1155. More comprehensively, however, determining the existence of substantial prejudice involves three factors: the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements. See generally Vess, *Walking a Tightrope; A Survey of Limitations on the Prosecutor's Closing Argument.* 64 J. Crim. L. & Criminology 22, 54-55 (1973). *United States v. Modica* (2d Cir. 1981).

As will be clearly shown, the misconduct was not only severe, but this was a case of deliberate misconduct.

Though specific and timely objections were made to the misconduct of the prosecutor, the Trial Court took absolutely no corrective action (A 196-201, 221-23) (994-998, 1088-1090).

Insofar as weighing the factor of the strength or weakness of the government's case, it was conceded that the Court's view that the case was "skimpy" and "the jury could find either way" was the correct one (A 112-114)(719, 723, 751).

It was close to ten years ago when the Second Circuit wrote:

> ...unless the prosecutor heeds our recent warnings, we may be left with no alternative but to reverse convictions where the argument of the prosecution goes beyond what is permissible and fair. But we fully expect that our criticism here...will not fall on deaf ears.

U.S. v. Bivona, 487 F.2d 443 (2d Cir. 1972).

And, still in *Modica* the Second Circuit once again reiterated its confidence that federal prosecutors would

take heed of the repeated warnings which have come from frequent comments against improper summations. However, in light of the frequency of such warnings, extending over a considerable period of time, are not the words of Judge Frank now, once and for all, particularly appropriate? He stated:

> The deprecatory words we use in our opinions ...are purely ceremonial. Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this Court - recalling the bitter tear shed by the Walrus as he ate the oysters - breeds a deplorably cynical attitude towards the judiciary.

United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), *cert. denied* 329 U.S. 742.

It is not a reversal we seek solely because of deterence purposes; rather, our position is that the summation made the conviction itself invalid. By deliberately and substantially prejudicing petitioner's constitutional right to a fair trial, it interfered with the jury's ability to reach a just verdict. In short, in this terribly thin case which prior to summations could have gone either way, it was the strategy of the prosecutor to wrest victory through a performance riddled with improper tactics. Despite the repeated comments of the Second Circuit it simply cannot bite the bullet and reverse, however egregious the prosecutorial misconduct may be in this area.

The Derogatory Comments About Trial Counsel

By a steady and repeated series of attacks upon the defense attorney, the prosecutor injected her own credibility into the case and diverted the attention of the jury to the conduct and manner of defense counsel. Such a tactic is contrary to para. 3-5.8 of the ABA Standards for Criminal Justice cautioning that the prosecutor should

refrain from argument which would divert the jury from its duty to decide the case on the evidence.

To set the stage, it was the position of the defense (concurred in we might add by the report of the Probation Officer) that petitioner was of "dull" intelligence. His grades supported this (A 116-18)(761-763); and neither the fact that he at times dated a college girl, was a good welding student or could successfully subtract three from five on the Apex Technical School comprehension test validly contradicted this (A 143-44)(868-869). So too, the fact that his uncles made him the nominee President of a two truck trucking company where he still nonetheless worked as a mechanic, in no meaningful way contradicted the position taken by the defense.[6]

It was the defense position that petitioner had nothing to do with the plan to steal or conceal the monies, that his involvement stemmed from an intention to carry out the directions of his father (to make the call and give the message to Mui and to pass on to Mui the envelope which his father had given him) not to an intention to join the criminal conspiracy.

We pressed that this nineteen year old unemancipated petitioner living at home all his life, without even his own bed, with his only work since leaving school before his sixteenth birthday at a family business was not sufficiently shielded against the father's commands what with petitioner's dull intelligence. The position was an honest one and completely accurate. To this valid position and to defense counsel, the prosecutor turned her venom:

> Now, Mr. Goldberg in the course of this case painted a picture of Alphonse Marrale.
>
> But is that the way Alphonse Marrale was treated during the conspiracy?

---

[6] At sentencing the Trial Judge indicated that despite what the Probation Officer found the Court believed petitioner had management skills because as he testified, in the business he first took in the receipts, then paid the bills and only then took his salary. To be frank, the Court's comments in this regard, respectfully, do not seem to warrant serious comment.

Mr. Goldberg kept referring to him as this boy. Stand up, sit down, stand up, sit down.

What is that? That is a tactic. That is Mr. Goldberg's style and don't by fooled by it.

Don't be fooled by it, ladies and gentlemen.

Don't be fooled by the condescending way Mr. Goldberg treated his client because that is just Mr. Goldberg's style.

He wants you to think his client is so stupid he can't tie his own shoelaces.

He wants you to think he can't stand up, sit down without being told, or think his way out of a paper bag.

He wants you to think that his client was not capable of doing anything except mindless following of his father's orders (A 160)(958).

Not as Mr. Goldberg portrayed Alphonse Marrale, not a dupe with no ability to say no, no ability to think, but as his father's trusted partner. (A 163)(961).

He said, I will make my son deliver the pills. What point did Mr. Goldberg try to make, trying to make the point that Frank Marrale was forcing his son to do things (A 169)(967).

In reaching a final, the final conclusive opinion, the determination about what Alphonse Marrale knew, who he is, who he was, and that is, what was he like in this courtroom? We know how Mr. Goldberg treated him in this courtroom. You saw him on the witness stand. You saw him on direct examination (A 185)(983).

That ladies and gentlemen, is the Alphonse Marrale of direct examination.

This is an Alphonse Marrale of Mr. Goldberg's very skillful presentation. You may think, poor boy. And Mr. Goldberg may argue that Frank Marrale, his father, was unscrupulous (A 187)(985).

Because is that Alphonse Marrale,[7] the Alphonse Marrale on direct examination, the Alphonse Marrale of Mr. Goldberg's tactic; is that Alphonse Marrale, is that Alphonse Marrale, the Alphonse Marrale that Frank Marrale dealt with during that conspiracy? (A 188)(986).

Welding, ladies and gentlemen — Mr. Goldberg tried to make welding sound like sweeping the courtroom, requiring no more intelligence than that.

I suggest, ladies and gentlemen, that that was because Mr. Goldberg didn't like the Alphonse Marrale that Edward Farrell knew, that his teacher knew (A 189)(987).

Is that the same — the same Alphonse Marrale as sat up there on direct examination? The same Alphonse Marrale that stood up and sat down at Mr. Goldberg's request? You decide.

And you learn something else. Something very interesting about the relationship between father and son. Now, Mr. Goldberg wants you to believe that Alphonse Marrale was so dominated by his father that he did whatever his father asked, without questioning (A 190-91)(988-989).

That is interesting, ladies and gentlemen, because — that is a very small point. What Mr. Goldberg objects to is your drawing an inference (A 207)(1074).

In this extremely close case the jury's attention was directed to whether defense counsel had falsely "painted a picture", attempted by his "style" to cause the jury purposely to "be fooled." The jury was told that defense counsel had concocted a false picture and it was counsel's "wants" to which the jury was directed. It was counsel who "portrayed" petitioner as a dullard. The

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[7] The transcript reads Frank Marrale. Obviously, the prosecutor either said Alphonse or meant him. Frank did not testify.

jury was told to remember the way his counsel treated him in the courtroom, though there was not one reference by the Court or government counsel during the trial phase of the case to anything in the record which warranted such an attack. It was not so that petitioner was dull; it was defense counsel's "very skillful presentation." In short, it was counsel's style and his wants, his likes and dislikes and his tactics and intent that became important to the prosecutor in summation.

Here, where so much depended upon the issue of the credibility of the petitioner the injection of the unwarranted issue of defense counsel's credibility and honesty were prejudicial error. (*U.S. v. Rios*, 611 F.2d, 1335 (10th Cir. 1979)).

The defense promptly brought this misconduct to the attention of the Trial Judge (A 197-201)(995-998). Though specifically directed to the errors in the prosecution summation, the Court did absolutely nothing. Thus, it was no surprise that the prosecutor continued down the same path in her rebuttal summation (A 222-23)(1089-90). Once again, the Court remained passive. The prosecutor's opening summation obviously was not in response to the summation of the defense. The Court had an obligation to issue curative instructions at the moment of impact.

In *U.S. v. Flaherty*, 668 F.2d 566, 598 (1st Cir. 1981) a whole series of prosecutorial improprieties survived appeal by reason of prompt cautionary instructions.

The unjustified decision to inject into this close case the honor of the defense attorney, a matter entirely unrelated to the issue of guilt or innocence, was improper. But much more, it interfered with the fact finding process of the jury for it explained the defense itself as the creation of counsel's tactic, style and skillful presentation. In short, the defense, it was conveyed, was manufactured by the defense attorney. There is no alternative to a reversal when in a close case a prosecutor deliberately embarks upon a path designed to

mislead a jury as to the appropriate issues before it for resolution. While there at times may be an "unwillingness to use reversals as a means of disciplining prosecutors" this Court should grant the writ where the error, as in the case at bar, threatened seriously to deter the jury in a thin case.

The Second Circuit found the prosecutor's summation justified by reason of the "tactics" and "histrionics" of the defense attorney. Such an approach misses the point that in a trial the issue is not whether a prosecutor may meet claimed improper defense conduct with her own improper conduct, whatever the effect on the fact finding process. If, during trial, defense tactics are viewed as improper, then at that point a Court should be called upon to give curative instructions. This approach is the proper one if the fact finding process is to remain intact. To sanction the approach adopted in this case is to rule that one bad defense tactic or behavior may be met with a response in kind by a government attorney while ignoring the essential end to be served by a jury trial and whatever damage to a defendant's right to a fair trial.

The Prosecutor Improperly Characterized the Defense

The injection of the prosecutor's credibility did not end with a personal attack upon the defense attorney. The whole defense of course according to her, was contrived:

> Ladies and gentlemen, I submit that this is a defense woven out of the thread of desperation and thread that unravels before you because Alphonse Marrale is wrong (A 157-58)(955-56).
>
> He lied [to the FBI] because he hoped that he could salvage that situation and when confronted with the tape, what did he do? He backed up only as much as he had to and said, oh, I did it. I did it but I didn't understand it. Exactly his defense today. He lied, ladies and gentlemen. (A)(1985).

As noted above, into this category of errors must be placed much of that which appears in the first category. This is so for the thrust of the prosecution summation was that the defense itself was the creation of the defense attorney who sought by his "style" and "tactics" to "fool" the jury.

The Prosecutor Further Injected Her Own Credibility Into This Case

The prosecutor used the first person more than forty times in a summation that was not very long. She assured the jury: "I suggest that the evidence shows (a fact) beyond any doubt" (A 155)(953). She told the jury: "I submit...the testimony of Mui...was uncontradicted and unimpeached" (A 154)(952). What made this so egregious was the Court's charge that if the jury believed Mui's testimony beyond a reasonable doubt it could convict petitioner (A 305-06)(1179-80). This, of course, was not so. Mui's testimony did not go to the critical issues of petitioner's knowledge and intent. Mui had absolutely nothing to offer to shed light on whether petitioner knew his father was involved in the theft or whether petitioner, when he acted, did so with the intent of merely following his father's orders or of joining an ongoing conspiracy. The Court's boilerplate charge in this regard, wholly inappropriate to the case at bar when combined with the prosecutor's remarks, could erroneously lead the jury to believe that once it believed Mui it was sufficient to convict the petitioner (A 296)(1170).

The summation was studded with the pronoun "I" (e.g. A 156-58, 162, 167-68, 217)(954, 955-56, 960, 965-66, 1084, as some examples of many others). The prosecutor knew of appellate holdings warning of this and brushed them aside as merely the fashion of the day (A 200)(997).

It hardly needs extended discussion to establish that such conduct is proscribed. It is simply improper for the prosecutor to inject her personal beliefs about

defense counsel and the conclusions to be drawn from the evidence. The reason for this rule is that such arguments bring into play the false issue of the credibility of counsel in which the United States invariably has the advantage. It was for this reason that the Trial Judge suggested that defense counsel refrain in his summation from injecting his credibility to meet that pressed by the prosecutor (A 201-02)(998-999). It has been said that "credibility of counsel is a false issue because it contravenes the truth seeking function of a trial:..." *U.S. v. Flaherty*, 668 F.2d 566, 596 (1st Cir., 1981). In the case at bar there was not the occasional use of rhetorical devices, but such constant use that the substantial risk was posed that the jury was likely to believe that the issue was whether the prosecutor was truthful rather than if her evidence were sufficient. But as the next point shows, if the prosecutor lacked evidence on a point, she simply made it up during summation with manufactured dialogue.

The Prosecutor Asserted As Facts That Which Had Not Been Proved And Thus Misstated The Evidence

In his charge the Trial Judge told the jury that the prosecutor was not required to produce "All available evidence..." (A 287)(1161). When such an instruction which, admittedly properly states the law, is given a prosecutor must be careful by her comments not to mislead the jury into believing there is other evidence which has not been produced. In the case at bar the prosecutor was too clever to do that by outright specific deception. However, her carefully chosen remarks with absolutely no evidentiary basis had the proscribed effect.

To explain petitioner's false exculpatory statements:

> But he discussed with his father the same thing his father had discussed with Steven Mui, how to protect yourself if you get caught. (A 194)(992).

To explain why petitioner gave Mui the envelope given to him by his father which contained the pills:

> I suggest that the evidence — the evidence supports your conclusion that what happened was that Frank Marrale said to Alphonse Marrale look, we have to take the polygraph, and we need something to get us over the hurdle. This is very important.
>
> Now, I know you have been fooling around with that stuff because I have been screaming at you for six months about it, and I want you to get some pills because I want you to get past that polygraph test; that is why Frank Marrale didn't give them to Steven Mui directly (A 214)(1081).
>
> Alphonse Marrale understood that. You heard him on the tape say, "Got to lay low for awhile. As long as everybody stays out of sight, everybody keeps quiet, nobody can prove anything" (A 151)(949).

There was no such statement by petitioner.

To support the prosecution theory of a conspiracy:

> Because the conversation between father and son, the conversation when the father said to the son, this is what I am going to do and I need your help. Can you help me? And the son responded, yes, I will help you. That's where the loyalty was. Yes, I will help you. We will change our lives together. I'm — I'm an adult. I am responsible. We will change our lives together. *That conversation had taken place long before.* (Italics added). (A 219)(1086).
>
> Didn't Alphonse — didn't Frank Marrale say to his son, Alphonse: We have a chance, we have a chance to dig out of this hole, will you help me? Because I need someone I can trust. I need someone I can rely on and give responsibility and have those responsibilities fulfilled (A 163)(961). Isn't that what happened? Didn't Frank Marrale say to his son, would you like to help?

> Isn't that what he was doing? Getting the money, getting the money for his father and for himself. Count me in. I'll never have a chance like that in his life.
>
> Finally, ladies and gentlemen, don't we see who Alphonse Marrale is? This trusted partner (A 188)(986).

Errors that might be overlooked must on the other hand, be viewed as much more significant where the proof is thin and the case close. It has been said that in determining whether to reverse there exists an inverse relationship between the degree of prejudice inherent in the prosecutor's summation and the strength of the prosecution case.

In the case at bar, wherever one turns in the summation, the prosecutor injected her own credibility into the case whether to portray defense counsel as low enough to scheme up the defense or claiming that the defense was the product of desperation or that Mui, the linchpin witness, stood wholly uncontradicted and unimpeached, or to present as conversations between father and son, dialogue which the evidence did not support. True that one is permitted to draw inferences from the evidence, but the cumulative effect of the prosecutor's improper comments, taking her summation as a whole, was improperly to lead to what amounted to a series of misstatements of fact (A 154, 217)(952, 1084).

II

The Post Arrest Statements Were Involuntarily Made. The Finding of Waiver by the Second Circuit Improperly Misinterprets That Principle. But of Utmost Importance, the Court Ignored *Payton v. New York*, 445 U.S. 573 (1980) When It Ruled That With a Showing of Probable Cause an Arrest Warrant Is Not Needed in a Non Exigent Entry Into a Home to Arrest the Occupant.

Involuntary statements may not be used for any purpose. See: *Payne v. Arkansas*, 356 U.S. 560, 567-8

(1958). The test of voluntariness is whether the conduct of law enforcement officials was such as to overbear petitioner's will to resist and bring about statements not freely self determined.

Prior to trial, petitioner moved to suppress the out of court post custodial statements that he had not seen or spoken with Mui. These admittedly were false.

The hearing on the motion immediately preceeded the trial. The proof showed four armed agents entered the Marrale family residence on December 10, 1981, without a warrant, intent upon arresting petitioner. No exigent circumstances were shown to justify dispensing with the warrant requirement *(Payton v. N.Y.*, 445 U.S. 573 (1980)) (A 22)(H 18).

Upon entering the home, the agents found petitioner, his 13 year old sister, 11 year old brother and mother. Unknown to the family, Frank had been arrested six or so hours earlier. Agent Flagg told petitioner that the father wanted him to come pick him up and drive him home. This was false (A 20)(H 9). Mrs. Marrale was screaming (A 20-21)(H 9, 12). When petitioner went to dress, he was placed under arrest by Agent Trahon and cuffed.

Agent Kinsley read him his rights, but did not tell him what he was being arrested for (A 22-33, 35)(H 20-21, 27, 28, 33-38, 67). On the ride to Queens petitioner was questioned and lied as earlier indicated (A)(H). While being questioned, he appeared sleepy (A 33, 36, 37)(H 44, 72, 106), but more importantly, according to Agent Trahon, he appeared "confused" (A 87)(586). Agent Flagg, in order to trick him, admittedly lied to him (A 34)(H 47). He did not act cocky or arrogant (A 38-39) (H 108, 109).

Though advised of his rights, can a defendant make a considered judgment about the need for silence or the need for an attorney if there is a studied attempt to keep from him the nature of the charges for which he has been arrested? We submit not. Further, such a "trick"

as would state to a son that his father has implicated him in a crime is one designed to overbear his will to exercise his right to remain silent. The situation becomes more egregious in light of petitioner's dull (as opined by the Probation Officer) intelligence, his grogginess, sleepiness and general confusion as testified to by Agent Trahon. All the while the interrogation occurred as petitioner sat between two agents with his hands cuffed behind his back. The interrogation itself was the product of an unlawful entry into the family home earlier that morning with a scene coercive in nature, what with the mother hysterical, the sister crying and Agents refusing to disclose the whereabouts of the father.

At FBI, Queens, the petitioner was questioned by Agent Nichols. She too falsely told him his father had already implicated him (783). Petitioner lied to Agent Nichols as to whether he had seen or spoken with Mui. (The prosecutor may raise that he lied as to whether he knew Vincent Gambale. The FBI 302 reflects he said he did not know the man's full name but when shown a picture of Gambale he stated he knew the man pictured as a friend of his father.)

Clearly, there are two sets of statements, one to Agent Flagg, the other to Agent Nichols. The statement to Flagg could not have been made with knowledge of their possible consequences, since the Agents carefully avoided advising him of the nature of the charge *U.S. v. Robinson,* 459 F.2d 1164 (D.C. 1972). It cannot be then said that a statement made in such ignorance is "the offspring of reasoned choice" *Id.*

It is clear that agents may resort to tricks in the interrogation process. However, if the trick is one likely to compel a response by stripping a defendant of his ability to make a rational free will choice, then such a tactic must be viewed as going too far. This is exactly what occurred when Agents Flagg and Nichols lied to petitioner stating that his own father had implicated him in the crimes.

Psychological coercion we suggest, may be any method or technique (i.e. a trick) so as to instill in a defendant a sense of fear, insecurity or other feeling which induces him to respond to questions posed by law enforcement officers. The tricks resorted to by the Agents were enough to taint the voluntariness of the statements.

At oral argument counsel recalled the recently decided Supreme Court case, which we submit is of critical importance: *Taylor v. Alabama*, decided June 23, 1982. As in the case at bar, the arrest of *Taylor* was illegal. In our case, it was illegal because it was made in the home following a non-exigent entry without a warrant to arrest. The statements obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the arrest and the statements so that the statements are sufficiently an act of free will to purge the primary taint. In the case at bar, there was no showing or consideration of whether the primary taint had been purged. In short, the statements of Marrale were themselves the fruits of the illegal arrest.

The Second Circuit ruled that the Trial Court's finding that petitioner had knowingly, intelligently and voluntarily waived his Fifth and Sixth Amendment rights were not clearly erroneous. As to the matter of *Payton v. New York*, 445 U.S. 573 (1980) the Court ruled first, that it had not been preserved, though it had been raised below. Secondly, the Court erroneously ruled that in light of there being probable cause for the arrest "no arrest warrant was required" (16a). *This holding clearly contradicts this Court's ruling in Payton.* This was a nonconsensual, non exigent entry into a private home for purposes of arresting petitioner. How then can the Second Circuit ruling that with probable cause alone such an arrest was proper? So too, the Court erred in dismissing our reference to *Taylor v. Alabama*, apparently adopting a waiver approach which is at odds with traditional motions of waiver. See: *Johnson*

v. Zerbst, 304 U.S. 458, 464-465 (1938); *Henry v. Mississippi*, 379 U.S. 443 (1964).

The *Payton* issue was expressly raised during the suppression hearing and the burden fell then upon the government to justify the warrantless entry. This was not done. Further, there was no showing that the primary taint arising out of the illegal arrest, had been purged when the statements were obtained.

Conclusion

For these reasons, this petition should be granted.

Respectfully submitted,

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